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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ANGEL ROJO, Defendant and Appellant.	B289621 (Los Angeles County Super. Ct. No. KA105000)

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Affirmed and remanded with directions.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Joseph P. Lee and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

Angel Rojo beat up a crime witness after telling her, "We told you not to call the cops." Then, drunk, he drove recklessly and crashed, killing his passenger. On appeal, he argues insufficient evidence supported his convictions for second degree murder and for dissuading a witness by force. He also contends his case should be remanded to allow the trial court to exercise sentencing discretion in light of Senate Bill No. 1393 (2017–2018 Reg. Sess.), which we abbreviate as SB 1393.

All code citations are to the Penal Code.

We remand for resentencing but otherwise affirm.

I

We recite the facts in the light most favorable to the prosecution.

On March 8, 2017, Rojo went to a friend's apartment to watch a fight on TV. Around a dozen folks were there and Rojo testified they "were drinking a lot." After the fight, Rojo and others started "horse playing"—"punching" and "shoving" each other—first inside the apartment and then in its back parking lot.

Elizabeth H. was in the parking lot, sitting in her car. She was talking on the phone to her boyfriend. Ernesto Chavez went to Elizabeth H.'s driver side door, opened it, and told her not to call the police. Elizabeth H. was confused. She asked, "Why would I call the police?" Chavez said, "because they're fighting." Elizabeth H. looked and saw "guys fighting." Chavez said, "Don't call the cops. That's how they handle their problems." Elizabeth H. testified she "told him, 'I don't care. Just not to get close to me. To handle their business somewhere else.'" Chavez closed the door and Elizabeth H. continued to talk to her boyfriend about their plans for the night.

Then Rojo opened Elizabeth H.'s door. "We told you not to call the cops," he said. Elizabeth H. replied she "wasn't calling the cops. That [she] was on the phone with [her] boyfriend." Rojo pulled her out of the car by her arm. He repeated, "We just told you not to call the cops." Elizabeth H. testified, "[Rojo] started shaking me by the arms, and he then just started hitting me. . . . He punched me on the face." Rojo knocked her out.

Rojo went to a nearby parking lot where a friend's car was parked. Rojo got into the driver seat and Manuel Rodriguez got into the passenger seat. A friend injured from fighting was in the back seat. Rojo didn't drive right away. He had a backpack with two bottles of Jack Daniels in it. He took one out and "drank it from the bottle." Then he drove. He drove with alcohol in his lap and weed in his pocket. He drove "fast."

The area Rojo drove through was residential; houses lined both sides of the street. He passed multiple cars. One car rested at a stop sign when he drove past at 60 to 90 miles per hour. Rodriguez told Rojo, "You passed a stop sign." Rojo responded, "Nah, you are tripping." Rojo testified, "then there's another stop sign. I actually seen it, but it was too late. I had already passed it. I was, 'All right. I will slow down.' And then there was a curve. I remember there being a curve, and I tried to press the brakes, and I don't remember exactly what happened after the brakes." He woke up upside down in the car. A witness testified the car hit a palm tree and flipped over. A police officer estimated Rojo was driving 80 to 100 miles per hour at the moment he braked.

Rodriguez was dead. Rojo testified he "heard sirens coming." He "went to hide everything . . . The alcohol, the weed." He ran, but was arrested for being under the influence of alcohol.

Rojo's counsel conceded at trial, "Rojo was drunk when all this happened." The arresting officer testified Rojo "had a strong odor of alcohol," slurred speech, and bloodshot eyes. Rojo was "tipping side to side and almost falling completely asleep." At the police station, Rojo admitted to an officer he was drunk. No blood or breath sample was ever taken from Rojo. At trial, Rojo said he "was aware of everything that [he] did."

A jury convicted Rojo of several crimes, including second degree murder and dissuading a witness by force. Rojo admitted to a prior felony conviction for the purposes of the five-year prior-felony sentencing enhancement. (§ 667, subd. (a)(1).) The trial court imposed three 5-year enhancements on Rojo's sentence.

II

Sufficient evidence supported the jury's conviction of second degree murder. We review the record in the light most favorable to the prosecution to determine whether a rational trier of fact could find the elements of second degree murder beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 324; *People v. Virgil* (2011) 51 Cal.4th 1210, 1263.)

On appeal, Rojo contests the sufficiency of the evidence for a single element: malice. (§§ 187–189.) Malice is implied where (1) the natural consequences of the act that caused the killing endanger life, and (2) the defendant is aware of that risk but acts deliberately with conscious disregard for life. (*People v. Knoller* (2007) 41 Cal.4th 139, 157; *People v. Watson* (1981) 30 Cal.3d 290, 296.)

The natural consequences of driving through a residential area at 80 to 100 miles per hour while drunk endanger life. There was sufficient evidence for the jury to infer Rojo appreciated that fact but consciously disregarded it. After Rojo

ran two consecutive stop signs, he told Rodriguez, "All right. I will slow down." That shows awareness of the risk he was creating. So too does Rojo's attempt to brake before crashing. (See *People v. Watson*, *supra*, 30 Cal.3d at p. 301 [Defendant "attempted to brake his car before the collision . . . suggesting an actual awareness of the great risk of harm which he had created"].) The jury could infer the presence of other cars further increased Rojo's awareness of the lethal risk he was creating. (*People v. Albright* (1985) 173 Cal.App.3d 883, 887 ["Defendant knew other people were on the road, and must have known of the high probability he would cause death if he continued his conduct and hit another car."]) Rojo himself summarized: "I was aware of everything that I did." This evidence was sufficient to find implied malice.

Contrary to Rojo's arguments, his conviction does not "eviscerate the distinction" between the subjective awareness required for implied malice and the objective reasonableness assessed for manslaughter. (*People v. Bennett* (1991) 54 Cal.3d 1032, 1036–1037.) The evidence showed Rojo was aware of the risk his actions created.

Rojo distinguishes cases that found implied malice by pointing to factors present in those cases but absent from his. But courts have repeatedly rejected attempts to reduce analysis of implied malice to a checklist of necessary factors. (*People v. Olivas* (1985) 172 Cal.App.3d 984, 989 (*Olivas*) ["[W]e read *Watson* as deliberately declining to prescribe a formula for analysis of vehicular homicide cases, instead requiring a case-by-case approach."]; *People v. McCarnes* (1986) 179 Cal.App.3d 525, 535 (*McCarnes*), quoting *Olivas* at p. 988–989; *People v. Superior*

Court (Costa) (2010) 183 Cal.App.4th 690, 698, citing *Olivas* and *McCarnes* at p. 535.)

There was no evidence of Rojo's precise blood alcohol level. Yet intoxication is unnecessary for a finding of implied malice. (*People v. Moore* (2010) 187 Cal.App.4th 937, 939.) Even if it were, the jury could conclude Rojo was too intoxicated to drive without endangering life. The arresting officer testified Rojo smelled like alcohol, and had slurred speech and bloodshot eyes. Rojo admitted that night, and at trial, he was drunk.

Proof Rojo intended to drive before he drank is likewise unnecessary. (*Olivas*, *supra*, 172 Cal.App.3d at p. 989.) Even if it were, there was evidence Rojo drank after he was in the driver's seat and thus presumably knew he would be driving.

Evidence of educational and legal notice of the dangers of drunk driving is unnecessary. *People v. Watson*, *supra*, 30 Cal.3d at page 300, which sustained a second degree murder indictment, "presumed that defendant was aware of the hazards of driving while intoxicated."

Rojo objects he did not have "any close calls with other vehicles that would have demonstrated his awareness of imminent danger." To repeat, after running two stop signs, Rojo told Rodriguez he would slow down. That statement shows his awareness of risk.

Sufficient evidence supported the second degree murder conviction.

III

Sufficient evidence also supported the witness dissuasion conviction. It is a crime to dissuade a witness from reporting a crime where the dissuasion is accompanied by force. (§ 136.1, subd. (c)(1).)

Rojo argues insufficient evidence supported his conviction because (1) Elizabeth H. did not witness a crime, and (2) she had no intention to report a crime. His first point is incorrect and his second point is irrelevant.

For the purposes of section 136.1, a witness includes any person who knows facts relating to a crime, or who a reasonable person would believe knows such facts. (§ 136, subd. (2).) Elizabeth H. observed a crime when she saw men fighting, which was after Chavez told her not to call the police but before Rojo warned and beat her. (See, e.g., § 242.)

Section 136.1 contains no requirement that the witness actually report or intend to report the crime. (§ 136.1.) What matters is whether the defendant attempted to dissuade a witness. Rojo intended to dissuade Elizabeth H. from calling the cops when he said to her, "We just told you not to call the cops" and then punched her.

Sufficient evidence supported this conviction.

IV

Rojo requests remand to allow the trial court to exercise its discretion under SB 1393. SB 1393 amended the Penal Code to give trial courts discretion to strike five-year prior felony enhancements imposed under section 667, subdivision (a)(1).

The parties agree SB 1393 applies to this case. But the prosecution argues remand is unnecessary because the trial court clearly indicated it would not exercise its discretion under the new bill. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [holding that in light of a new senate bill, remand for resentencing was required unless the record showed the trial court clearly indicated it would not have exercised its discretion].)

The trial court's comments at sentencing suggest it imposed five-year prior felony enhancements because doing so was mandatory. After imposing the enhancements, the court said, "I believe that's what the court *must* do." We therefore remand.

DISPOSITION

We remand to allow the trial court to exercise its sentencing discretion under SB 1393. The judgment is otherwise affirmed.

WILEY, J.

We concur:

BIGELOW, P. J.

GRIMES, J.